United Nations A/64/338

General Assembly

Distr.: General
4 September 2009

Original: English

**Sixty-fourth session**
Item 68 (a) of the provisional agenda*
**Indigenous issues**

# Second International Decade of the World's Indigenous People

## Note by the Secretary-General**

The Secretary-General has the honour to transmit to the Members of the General Assembly the report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, in accordance with paragraph 1 of General Assembly resolution 63/161.

* A/64/150.
** The present report was submitted late owing to administrative difficulties.

09-50281 (E) 011009

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# Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people

*Summary*

The present report is the first submitted to the General Assembly by the current Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, pursuant to General Assembly resolution 63/161. The Special Rapporteur discusses the implementation of his mandate pursuant to Human Rights Council resolution 6/12, in which he was directed to work cooperatively with States, indigenous peoples, the United Nations, regional bodies and non-governmental organizations and to pay particular attention to both the obstacles preventing full enjoyment of the human rights and fundamental freedoms of indigenous peoples and to best practices in overcoming these obstacles, including through the promotion of the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples. The rights set forth in the United Nations Declaration serve as a platform for the cooperative manner in which the Special Rapporteur carries out his work, inform his collaboration with the United Nations mechanisms with which he engages and form the core of his concerted involvement with States, indigenous peoples' organizations and civil society partners.

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# I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, pursuant to General Assembly resolution 63/161. On 28 March 2008, the Human Rights Council appointed James Anaya of the United States of America as the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Mr. Anaya, who assumed his mandate on 1 May 2008, has since submitted two reports to the Human Rights Council.

2. In his first annual report (A/HRC/9/9), the Special Rapporteur provided a number of reflections concerning the normative framework for addressing indigenous peoples' concerns and the operationalization of the human rights norms affirmed in the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments. In his second report (A/HRC/12/34) the Special Rapporteur gave a detailed description of his methods and areas of work and analysed the duty of States to consult with indigenous peoples on matters affecting them, with the hope of offering insight into how this core issue may be addressed in the future by Governments, indigenous peoples, the United Nations system and other stakeholders, and offered various recommendations in that regard.

3. The present report, the Special Rapporteur's first to the General Assembly, presents an overview of the scope of his mandate in accordance with Human Rights Committee resolution 6/12, highlighting coordination with other mechanisms and bodies and outlining several activities undertaken from 1 May 2009 to 1 September 2009 with United Nations and regional bodies in the spirit of collaboration (sect I). The report provides a brief description of the areas of work of the Special Rapporteur, within the terms of his mandate, to monitor the human rights conditions of indigenous peoples worldwide and promote steps to improve those conditions in line with relevant international standards (sect. II). These areas of work fall within four interrelated spheres of activity: promoting good practices; thematic studies; country reports, and cases of alleged human rights violations. The report provides an analysis of the United Nations Declaration on the Rights of Indigenous Peoples, including its adoption and related developments, general character and content, and underscores the central role that it plays in the promotion of the rights of indigenous peoples by the United Nations system, States, indigenous peoples' organizations and civil society partners (sect. III).

4. The Special Rapporteur is grateful for the support provided by the staff at the Office of the United Nations High Commissioner for Human Rights (OHCHR). He would also like to thank staff and affiliated researchers of the Indigenous Peoples Law and Policy Program at the University of Arizona for their continued assistance with all aspects of his work. Finally, the Special Rapporteur would like to thank the many indigenous peoples, Governments, United Nations bodies and agencies, non-governmental organizations, and others that have cooperated with him over the past year and a half to implement his mandate.

# II. Scope of the mandate

5. The Commission on Human Rights, in its resolution 2001/57, established the mandate of the Special Rapporteur on the situation of human rights and fundamental

freedoms of indigenous peoples with the authority, inter alia, to "gather, request, receive and exchange information and communications from all relevant sources" concerning human rights violations against "indigenous people themselves and their communities and organizations", and to "formulate recommendations and proposals on appropriate measures to prevent and remedy" such violations (para. 1). The Special Rapporteur was further invited to "take into account a gender perspective" and to pay special attention to the situation of indigenous women and children (paras. 2 and 3).

6. In its resolution 6/12, the Human Rights Council, as the successor body to the Commission on Human Rights, expanded the scope of the original resolution, adding directives for the Special Rapporteur to work cooperatively with States, indigenous peoples, United Nations and regional bodies and non-governmental organizations and to pay particular attention to both the obstacles preventing full enjoyment of the human rights of indigenous peoples and to best practices in overcoming these obstacles. Significantly, the resolution further directed the Special Rapporteur to promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate, thus providing the Special Rapporteur's activities with a clear normative framework, discussed in more detail in section III below.

## A. Coordination with other mechanisms and bodies

7. As indicated in Human Rights Committee resolution 6/12, coordination with other institutions is a fundamental aspect of the mandate of the Special Rapporteur. In that resolution, the Council directed the Special Rapporteur "To work in close cooperation, while avoiding unnecessary duplication, with other special procedures and subsidiary organs of the Human Rights Council, relevant United Nations bodies, the treaty bodies, and human rights regional organizations" (resolution 6/12, para. 1 (d).

8. The Special Rapporteur is specifically required "To work in close cooperation with the Permanent Forum on Indigenous Issues and to participate in its annual session" (resolution 6/12, para. 1 (e)). Such cooperation also extends to the expert mechanism, which is mandated by the Human Rights Council to invite the Special Rapporteur to its annual session in order to "enhance cooperation and avoid duplicating the work" of the respective mechanisms (resolution 6/36, para. 5). During the course of his work, the Special Rapporteur has noted a significant level of confusion among indigenous groups, non-governmental organizations and other stakeholders about the respective roles and functions of the three mechanisms, as well as their place within the institutional structure of the United Nations, and believes that continued education about the individual mandates and functions of these mechanisms is essential.[1]

9. With the aim of addressing some of the questions regarding roles and functions of the three mechanisms, the Special Rapporteur, with the former Special

[1] See Economic and Social Council resolution 2000/22, establishing the Permanent Forum, and Human Rights Council resolution 6/36 establishing the expert mechanism. For further discussion on the complementarity and differences among these bodies, see A/HRC/12/34.

Rapporteur, Rodolfo Stavenhagen, participated in a seminar in Madrid from 4 to 6 February 2009 with the members of the expert mechanism and four members of the Permanent Forum, along with several experts from various regions. The main objective of the meeting, organized by the International Work Group for Indigenous Affairs and the Almáciga Intercultural Working Group, was to promote an informal dialogue among the members of the three mechanisms to better coordinate their work, and their activities with other United Nations agencies and bodies, especially the need for close cooperation and partnership to promote the operationalization of the rights affirmed in the United Nations Declaration. During the meeting, the experts discussed methods for streamlining the work of the three mechanisms by examining the priority work area or areas of the respective mandates and identifying ways in which the aspects of each mandate might be maximized.[2]

10. The Special Rapporteur reports annually to the Permanent Forum and to the expert mechanism, and has also been active in constructing a dialogue with agencies of the United Nations Secretariat, their regional presences and the specialized agencies on indigenous issues. He engaged with representatives of various United Nations agencies in a seminar organized by the United Nations Development Programme (UNDP) in New York, on 20 May 2009, in which he emphasized the role of United Nations agencies and programmes in implementing the United Nations Declaration. He also met with officers of the Department of Public Affairs of the Secretariat on 21 May and has subsequently worked to build coordinated action in areas of mutual interest.

11. The Special Rapporteur participated in two seminars on the United Nations Declaration on the Rights of Indigenous Peoples in Latin America, one in Lima, from 6 to 8 October 2008 in cooperation with the International Labour Organization (ILO), and one in Montelimar, Nicaragua, from 10 to 13 June 2009, organized by OHCHR. OHCHR promotes implementation, at the regional level, of the rights and corresponding State obligations expressed in the Declaration through education, information-gathering and advisory services. During the two seminars, the Special Rapporteur gave presentations on the content and means of implementing the Declaration as it pertains to the Latin American region. The Declaration was also the subject of a presentation he gave to participants at a seminar entitled "The United Nations Declaration on the Rights of Indigenous Peoples: a pending agenda", organized by UNDP in Costa Rica on 11 November 2008 in San Jose.

12. On 3 June 2009, the Special Rapporteur was the featured speaker at a seminar entitled "Advancing indigenous rights and development in Latin America and the Caribbean" in Washington, D.C., at which he focused on the role of the World Bank in relation to various challenges and initiatives concerning indigenous peoples. He continues to maintain contact and to cooperate with representatives of the World Bank in exploring ways of further coordination on issues in Latin America and beyond.

13. On 25 October 2008, the Special Rapporteur participated in an expert seminar on indigenous land rights and the principle of free, prior and informed consent in Washington, D.C., sponsored by the Inter-American Commission on Human Rights. He has exchanged information with the Commission on various cases. In addition,

[2] Summary report of the International Expert Seminar on the Role of United Nations Mechanisms with a Specific Mandate Regarding the Rights of Indigenous Peoples (A/HRC/12/34/Add.7).

the Special Rapporteur has confirmed his willingness to cooperate with the Working Group on Indigenous Populations/Communities in Africa of the African Commission on Human and Peoples' Rights, and looks forward to exploring concrete ways in which he may enhance collaboration with the Commission and other regional bodies in the future. These current and potential initiatives are in line with Human Rights Council resolution 6/12, mandating the Special Rapporteur "... to develop a regular cooperative dialogue with ... regional or subregional international institutions".

# III. Areas of work

14. The Special Rapporteur has engaged in a range of activities within the terms of his mandate to monitor the human rights conditions of indigenous peoples worldwide and promote steps to improve those conditions in line with relevant international standards, including those of the United Nations Declaration on the Rights of Indigenous Peoples. Overall, the Special Rapporteur has tried to develop work methods oriented towards constructive dialogue with Governments, indigenous peoples, non-governmental organizations, relevant United Nations agencies and other actors in order to address challenging issues and situations and build on advances already made. The various activities that he has carried out in this spirit can be described as falling within four interrelated spheres of activity: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations.

## A. Promoting good practices

15. One area of the Special Rapporteur's work follows from the directive given him by the Human Rights Council "to identify ... and promote best practices" (resolution 6/12, para. 1 (a)). The Special Rapporteur has been focused on working to advance legal, administrative and programmatic reforms at the domestic level to implement the standards of the United Nations Declaration on the Rights of Indigenous Peoples and other relevant international instruments. Reform of this kind is a major undertaking, as it is full of all kinds of complexities and requires a strong commitment, both financial and political, on the part of Governments.

16. During the course of his work, the Special Rapporteur has been asked to provide assistance with constitutional and legislative reform initiatives by providing orientation on how to harmonize those initiatives with relevant international standards. Shortly after assuming his mandate in May 2008, the Special Rapporteur was asked by indigenous organizations and the President of the Constituent Assembly of Ecuador to provide technical assistance with the constitutional revision process as part of the programme of technical assistance by UNDP in the country. During his working visit, the Special Rapporteur had the opportunity to engage in a constructive dialogue with members of the Constitutional Assembly, experts and representatives of indigenous organizations and the Confederation of Indigenous Nationalities of Ecuador. The Special Rapporteur submitted a number of observations to the Government regarding some of the issues raised during his working visit in the light of relevant international norms (see A/HRC/9/9/Add.1). Ecuador's new Constitution was approved by referendum in September 2008 with

significant provisions affirming indigenous collective rights. The Special Rapporteur continues to monitor Ecuador's implementation of those reforms and subsequent legislation.

17. The Special Rapporteur has also promoted good practices by encouraging the positive steps taken by member States. In December 2008, the Special Rapporteur was invited to attend a ceremony in Awas Tingni, Nicaragua, during which the Government handed over to the indigenous community the long-awaited title to its ancestral lands, as required by a 2001 judgement of the Inter-American Court of Human Rights. In a press release following the ceremony, the Special Rapporteur commended the Government of Nicaragua for taking affirmative steps to implement the judgement. The Special Rapporteur will continue to monitor progress towards ensuring that the rights of the indigenous peoples of Awas Tingni to the titled lands are fully respected in practice by third parties and towards addressing the land and related claims of other indigenous communities.

18. In April 2009, the Special Rapporteur visited Chile to assess the situation of the indigenous peoples of that country, in follow-up to the 2003 visit to Chile by his predecessor. While indigenous peoples in Chile face persistent problems, the Government has taken important steps in recent years to advance the protection of their rights, including by ratifying, in September 2008, the ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries of 1989 and by committing itself to the enactment of constitutional reforms to recognize and promote indigenous rights. In light of the constitutional reform process, the Special Rapporteur developed and submitted a report to the Government,[3] which was subsequently made public, outlining and analysing the various applicable elements of the right to consultation, and providing examples of consultation mechanisms in other countries. The Government has initiated consultations with indigenous groups in Chile on the constitutional reform process and the Special Rapporteur continues to monitor their progress.

19. The Special Rapporteur participated in a seminar on indigenous rights in Jakarta from 16 to 17 March 2009, sponsored by the Indonesian National Human Rights Commission and the Indigenous Peoples' Alliance of the Archipelago. At the seminar the Human Rights Commission and the Peoples' Alliance announced an agreement on a joint programme to address indigenous issues — a good example of coordination between a State's independent human rights commission and a major indigenous organization.

20. On 22 October 2008, the Special Rapporteur attended the sixty-fifth convention of the National Congress of American Indians, at which he provided a presentation on the use of international standards to strengthen the protections for the rights of indigenous peoples in the United States of America. The National Congress is a coalition of over 250 indigenous nations in the United States which works to inform decisions of the Government of the United States and Congress that affect indigenous peoples' interests.

21. From 27 to 31 October 2008, the Special Rapporteur joined representatives of Saami communities from throughout the Saami territory in the Nordic countries and the Russian Federation, Government representatives and others in attendance at the nineteenth Saami Conference in Rovaniemi, Finland. At the conference, the Special

[3] A/HRC/12/34/Add.6.

Rapporteur was able to meet with the Saami Council and the Saami Parliaments in the Nordic countries to discuss ways of strengthening institutional arrangements for protecting their rights. The Saami Parliaments have become an increasingly effective means for Saami people to enhance control over matters affecting their lives and communities.

22. In an innovative initiative by an indigenous government, the Navajo Nation in the United States has established the Navajo Nation Human Rights Commission. On 19 December 2008, the Special Rapporteur attended a "human rights orientation" organized by the Commission for members of the Navajo Nation Council and engaged in a discussion with the Commission and Council members on ways to advance the human rights of Navajo people through the use of international human rights mechanisms.

23. The Special Rapporteur visited Australia to attend a meeting entitled "The sixtieth Anniversary of the Universal Declaration on Human Rights: The Situation of Human Rights and Fundamental Freedoms of the Aboriginal and Torres Strait Islander People of Australia", organized by the Foundation for Aboriginal and Islander Research Action in Canberra from 3 to 5 December 2008. During the visit the Special Rapporteur had the opportunity to meet informally with various governmental representatives, marking the beginning of a constructive dialogue in preparation for his mission in August 2009.

24. An important component of efforts to build good practices at the domestic level is a policy of commitment to advance the rights of indigenous peoples in accordance with the United Nations Declaration. As noted, in 2009, Australia officially endorsed the Declaration and Colombia expressed its support for the Declaration. In his future work, the Special Rapporteur will continue to promote positive developments. The Special Rapporteur reiterates his willingness to offer constructive technical and advisory assistance to Governments, companies, indigenous peoples and other stakeholders, where needed, in their efforts to establish legal, administrative and programmatic initiatives and reforms in indigenous matters. The work of the Special Rapporteur in this regard will be oriented in practical terms and aimed at identifying and promoting models that can be applied in various contexts. The Special Rapporteur foresees detailing these models, where they exist and have been successful, in his subsequent reports to the General Assembly and to the Human Rights Council as well as in other public reports.

## B. Thematic studies

25. A second area of the Special Rapporteur's work, which is intended to contribute to good practices in specific country situations, involves conducting or participating in studies on issues or themes that are of interest to indigenous peoples in all regions of the world. The former Special Rapporteur carried out a number of thematic studies to identify major issues and to provide a foundation for subsequent positive practical action and reform, including on the impacts of development projects on indigenous communities, the implementation of domestic laws and international standards to protect indigenous rights, indigenous peoples and the education system, the relationship between formal State law and customary indigenous law and international norms concerning indigenous peoples.

26. However, taking into consideration the establishment of the expert mechanism on the rights of indigenous peoples, with a mandate to provide thematic expertise and recommendations to the Human Rights Council on issues affecting indigenous peoples, the Special Rapporteur now sees his own work in carrying out thematic studies as secondary to the other areas of his work. His role, for the most part, will be complementary and supportive of the work of the expert mechanism. In this regard, early in 2009 he provided information, based on his experiences as Special Rapporteur, for the expert mechanism's current study on the right of indigenous peoples to education.

27. In addition, in the interest of further understanding the specific challenges facing indigenous women, the Special Rapporteur participated in a regional consultation on violence against indigenous women in the Asia Pacific region with the former Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. The regional consultation, which was organized in New Delhi by the Asia Pacific Forum on Women, Law and Development and the Mahila Sarvangeen Utkarsha Mandal development group, was followed by a national consultation from 14 to 18 October 2008. Participants in the consultations, many of them indigenous women from the region, identified key recurring issues contributing to violence, including discriminatory acts against indigenous women in the following areas: economic globalization; militarization and armed conflict; and culture, tradition and religion and their intersectional impacts on the lives of indigenous women. The discussions with the two Special Rapporteurs were focused on identifying effective strategies and mechanisms for addressing multiple forms of violence against indigenous women at the national, regional and international levels and on learning from good practices. The consultations culminated in a report entitled "Defending the Rights of Indigenous Women in the Asia Pacific: Towards an Inclusive and Violence-Free Future".

28. The Special Rapporteur is also collaborating with non-governmental organizations and indigenous experts on two initiatives related to two thematic areas of recurrent concern to indigenous peoples. One is a seminar, organized by the non-governmental organization Khredda and the United Nations Educational, Scientific and Cultural Organization (UNESCO) Centre of Catalonia, which is to take place in October 2009, on dispute resolution mechanisms with regard to extractive industries operating or seeking to operate within indigenous territories. The seminar and its outcome report correspond to a recommendation made last year by the Permanent Forum that the Special Rapporteur carry out a study on transnational corporations, and the seminar is intended to complement the Permanent Forum's own work on this subject. The second initiative is a multifaceted study on legal pluralism and indigenous customary law, to be carried out in collaboration with the International Council on Human Rights Policy and OHCHR. This study is likely to begin with a workshop at the University of Arizona, some time next year.

## C. Country reports

29. A third area of the Special Rapporteur's work involves investigating and reporting on the overall human rights situations of indigenous peoples in selected countries. The reports of the country situations include conclusions and recommendations aimed at strengthening good practices, identifying areas of

concern and improving the human rights conditions of indigenous peoples. The reporting process typically involves a visit to the countries under review, including to the capital and selected places of concern within the country, during which the Special Rapporteur interacts with Government representatives, indigenous communities from different regions and a cross section of civil society actors working on issues relevant to indigenous peoples. In accordance with the Code of Conduct for Special Procedures Mandate-holders of the Human Rights Council (see HRC resolution 5/2), these visits can only take place with Government consent and cooperation.

30. Since beginning his mandate, the Special Rapporteur has visited Brazil,[4] Nepal,[5] Botswana,[6] and Australia to report on those countries, and he has conducted follow-up visits to Chile[7] and Colombia to evaluate their progress in implementing the recommendations in the reports of his predecessor. In addition, the Special Rapporteur will be visiting the Russian Federation in October 2009 and has received positive indications from the Republic of the Congo for a forthcoming visit. The Special Rapporteur has outstanding requests for visits to India and Indonesia, which he hopes will be considered favourably in the near future.

## D. Cases of alleged human rights violations

31. Finally, the fourth and perhaps principal area of the Special Rapporteur's work involves responding, on an ongoing basis, to specific cases of alleged human rights violations.[8] A fundamental aspect of the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, as reaffirmed by the Human Rights Council, is "to gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people and their communities and organizations, on alleged violations of their human rights and fundamental freedoms" (resolution 6/12, para. 1 (b)). The Special Rapporteur has placed special emphasis on his mandate "to develop a regular cooperative dialogue with all relevant actors" (resolution 6/12, para. 1 (f)) by developing ongoing long-term strategies for all the work he undertakes to address alleged violations of the human rights of indigenous peoples.

32. The Special Rapporteur's ability to address specific situations of alleged violations relies, to a large extent, on the information provided to him by indigenous peoples and their organizations, non-governmental organizations and other sources. Over the past year, the Special Rapporteur has received information about cases of alleged human rights violations in countries worldwide and, in response, has sent numerous communications to Governments about these situations. These cases involve, inter alia, infringements of the right to free, prior and informed consent, especially in relation to natural resource extraction and displacement or removal of

[4] A/HRC/12/34/Add.2.
[5] A/HRC/12/34/Add.3.
[6] A/HRC/12/34/Add.4.
[7] A/HRC/12/34/Add.6.
[8] A complete summary of communications sent, responses received from Governments and observations of the Special Rapporteur can be found in the reports presented to the Human Rights Council; see A/HRC/9/9/Add.1 and Corr.1 and A/HRC/12/34/Add.1.

indigenous communities; denial of the rights of indigenous peoples to lands and resources; the situation of indigenous peoples in voluntary isolation; incidents of threats or violence against indigenous peoples and individuals, including defenders of indigenous rights; and concerns about constitutional or legislative reforms on indigenous issues.

33. Given the limited resources available, it is impossible for the Special Rapporteur to respond to every case that comes to his attention. However, in general, he does his best to act on detailed and credible information that presents a serious situation falling within his mandate in which intervention has a reasonable chance of having a positive impact, either by drawing needed attention to the situation or by prompting Government authorities or other actors to take corrective action. Alternatively, the Special Rapporteur may take action where the situation is representative of, or connected to, a broader pattern of human rights violations against indigenous peoples. The Special Rapporteur has been careful to respond to allegations of human rights violations from a wide range of regions and countries.

34. The usual first step in taking action on such information is to write a letter to the Government concerned, along with a request that the Government respond. In some cases, the Special Rapporteur has issued public statements calling attention to, or expressing concern over, the human rights violations alleged. If circumstances warrant it and the Government concerned consents, the Special Rapporteur may conduct a country visit to examine a specific situation, as he did to examine the situation of the indigenous communities that are affected by the construction of a hydroelectric project on the Changuinola River in Panama,[9] and to examine the human rights issues surrounding the confrontations between indigenous peoples and the police in Bagua, Peru.[10] In addition, as he has done with regard to the situations examined in those two countries and expects to do in future cases, he may issue detailed observations with analyses and recommendations, in the hope that they will be of use to the Governments and indigenous peoples concerned in their efforts to address the problems raised.

35. In some cases, the Special Rapporteur is invited to participate in an activity at which information regarding alleged human rights violations of indigenous peoples is brought to his attention. Between 9 and 11 December 2008, the Special Rapporteur attended a consultation in Minnesota, the United States, regarding the exhumation of Hmong graves at Wat Tham Krabok, Thailand, and heard from families affected by the exhumations who now live in Minnesota. The information provided to the Special Rapporteur was the subject of a communication sent to the Government of Thailand on 10 March 2008.[11]

36. The Special Rapporteur is aiming to avoid the "revolving door" approach of simply sending a communication and receiving a response from the Government concerned, but rather to engage actively with States, indigenous peoples and other actors to closely monitor and evaluate situations, identify underlying causes of immediate problems, promote specific action that builds on advances already made and develop recommendations that are practical, well founded in available knowledge and in accordance with relevant human rights standards. Accordingly, the rights afforded to indigenous peoples in the United Nations Declaration form the

[9] A/HRC/12/34/Add.5.
[10] A/HRC/12/34/Add.8.
[11] A/HRC/12/34/Add.1.

basis of the dialogue with Governments that the Special Rapporteur initiates or maintains concerning alleged human rights violations.

## IV. Declaration on the Rights of Indigenous Peoples

37. As noted, in its resolution 6/12 the Human Rights Council directed the Special Rapporteur to "promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate" (para. 1 (g)), thus providing a clear normative framework for his work. The Special Rapporteur is mandated to work cooperatively with States, indigenous peoples, United Nations and regional bodies and non-governmental organizations and to pay particular attention to both the obstacles preventing full enjoyment of indigenous peoples' human rights and to best practices in overcoming these obstacles. This spirit of respect, cooperation and mutual understanding underlines the role of the Special Rapporteur in finding effective ways to fully realize the rights of indigenous peoples, which are affirmed in the United Nations Declaration, and in contributing to a better understanding — by all parties involved, and with their cooperation — of the legal, political, economic and institutional implications of the international recognition of the rights of indigenous peoples, and the implementation of the rights associated with such recognition.

38. The rights set forth in the United Nations Declaration serve as a platform for the cooperative manner in which the Special Rapporteur carries out his work, inform his collaboration with the United Nations mechanisms with which he engages and form the core of his concerted involvement with States, indigenous peoples' organizations and civil society partners. Underscoring the central role the document plays in the promotion of the rights of indigenous peoples, the present section includes a brief discussion of the adoption of the United Nations Declaration, its general character and content and the operationalization of the rights set out in the Declaration by components of the United Nations system, States, indigenous peoples and their organizations and civil society partners.

### A. Adoption

39. During the last three decades, the demands for recognition of indigenous peoples across the world have led to the gradual emergence of a common body of opinion regarding the content of the rights of these peoples on the basis of long-standing principles of international human rights law and policy. This common normative understanding has been promoted by international and regional standard-setting processes; by the practice of international human rights bodies, mechanisms and specialized agencies; and by a significant number of international conferences and expert meetings. Furthermore, the emergence of this common understanding has been increasingly reflected in and supported by State practice and constitutional, legislative and institutional reforms at the domestic level. The Declaration on the Rights of Indigenous Peoples is the most important of these developments globally, encapsulating the widely shared understanding about the rights of indigenous peoples that has been building over decades on a foundation of previously existing sources of international human rights law.

40. The protracted negotiations that stretched over two and a half decades and ended with the adoption of the United Nations Declaration on 13 September 2007 engaged States, indigenous peoples and independent experts in an extended multilateral discussion that was central to the emergence, internationally, of a common body of opinion on the rights of indigenous peoples. Notably, while influenced by discussions within the United Nations around the initiative to develop an indigenous rights declaration, the development of ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, building on the rights set forth in its predecessor ILO Convention (No. 107) of 1957, contributed, in turn, to the process that finally led to the adoption of the Declaration.

41. The General Assembly adopted the United Nations Declaration in its resolution 61/295 by an overwhelming majority of Member States: 143 voting in favour, 4 against and 11 abstaining. While the explanatory statements of the four States that voted against the adoption of the Declaration (Australia, Canada, New Zealand and the United States) showed disagreement with the wording of specific articles or concerns with the process of adoption, they also expressed a general acceptance of the core principles and values that it advanced.

42. Despite its initial vote, in 2009 Australia officially endorsed the Declaration and, in a widely circulated statement, committed to fully implement the standards contained therein. This is a welcome development in Australia's policies towards indigenous peoples, which the Special Rapporteur noted in a press release issued jointly with the Chairpersons of the expert mechanism and the Permanent Forum in April 2009. Colombia, which had abstained in the vote on the Declaration, sent a letter, through the Deputy Minister of Multinational Affairs, to the United Nations High Commissioner for Human Rights on 20 April 2009 expressing its support for the Declaration and the principles contained therein and subscribing to the concepts of equality, respect for diversity and non-discrimination that constitute the foundation of the Declaration. It is hoped that States which abstained or voted against adoption may take similar stances.

## B. General content and character

43. The basic normative justification of the Declaration is stated in the sixth preambular paragraph, which states that "indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests". The Declaration's preamble thus stresses the essentially remedial purpose of the instrument. Far from affirming special rights per se, the Declaration aims at repairing the ongoing consequences of the historical denial of the right to self-determination and other basic human rights affirmed in international instruments of general applicability.

44. The Declaration affirms, in article 3, the right of indigenous peoples to self determination, in terms that restate the common provisions of article 1 of the two 1966 international human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Reflecting the state of contemporary international law in relation to this principle as well as the demands of indigenous peoples themselves, the affirmation

of self determination in the Declaration is deemed compatible with the principle of territorial integrality and political unity of sovereign and independent States.[12]

45. On these grounds, the Declaration provides a detailed list of norms that constitute "the minimum standards for the survival, dignity and well-being of indigenous peoples of the world" (article 43). The Declaration reaffirms basic individual rights to equality and non-discrimination, life and personal integrity and freedom, and nationality and access to justice; and it calls for special attention to specific rights and needs of indigenous elders, women, youth, children and persons with disabilities.[13] At the same time, the Declaration affirms rights of a collective character in relation to self-government and autonomous political, legal, social and cultural institutions; cultural integrity, including cultural and spiritual objects, languages and other cultural expressions; lands, territories and natural resources; social services and development; treaties, agreements and other constructive arrangements; and cross-border cooperation.

46. Together with affirming the aspects of self-determination related to maintaining spheres of autonomy, the Declaration also reflects the common understanding that indigenous peoples' self-determination simultaneously involves a participatory engagement and interaction with the larger societal structures in the countries in which they live. In this connection, the Declaration affirms indigenous peoples' right "to participate fully, if they so choose, in the political, economic, social and cultural life of the State";[14] and to be consulted in relation to decisions affecting them, with the objective of obtaining their prior, free and informed consent.[15]

47. The Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples. These include the basic norms of equality and non-discrimination, as well as other generally applicable human rights in areas such as culture, health or property, which are recognized in other international instruments and are universally applicable.

48. While clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States, as demonstrated by the work of United Nations treaty bodies and other human rights mechanisms. It can therefore be seen as embodying, to some extent, general principles of international human rights law. In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as reflecting norms of customary international law.[16] In any event, as a resolution adopted by the General Assembly with the approval of an

[12] Article 46 (1).

[13] Article 22 (1).

[14] Article 5. See also article 18 (affirming the right to participate in "the decision-making in matters which would affect their rights").

[15] Article 19 ("States shall consult and cooperate in good faith with the indigenous peoples concerned ... in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them"). For an analysis of the principle of free, prior and informed consent, see observations concerning Ecuador (A/HRC/9/9/Add.1 and Corr.1).

[16] See S. James Anaya and Siegfried Wiessner, "The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment", *Jurist* (3 October 2007).

overwhelming majority of Member States, the Declaration represents a commitment on the part of the United Nations and Member States to its provisions, within the framework of the obligations established by the Charter of the United Nations, to promote and protect human rights on a non-discriminatory basis.

49. The United Nations Declaration reflects the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with, and expands upon, the provisions of ILO Convention No. 169, as well as with other developments, including the interpretations of other human rights instruments by international bodies and mechanisms. As the most authoritative expression of this consensus, the Declaration provides a framework of action towards the full protection and implementation of these rights.

## C. Mechanisms for operationalization

### 1. Cooperation among the components of the United Nations system[17]

50. Implementing the Declaration is a joint task that pertains specially to United Nations human rights bodies, mechanisms, and specialized agencies, including but not limited to those with a particular mandate regarding the rights of indigenous peoples, as well as to the various United Nations programmes which in some way touch upon indigenous issues. With a view to assigning the role of implementing the rights set forth in the Declaration, article 42 underlines the role of United Nations bodies and specialized agencies, calling on them to "promote respect for and full applications of the provisions" of the Declaration and provide "follow-up" for its effective application. Article 41 of the Declaration explicitly calls upon the organs and specialized agencies of the United Nations system "to contribute to the full realization" of the Declaration, including, inter alia, through the mobilization of "financial cooperation and technical assistance".

51. The mandate of the Special Rapporteur, entrusts the mandate-holder with the responsibility of promoting the Declaration and other relevant international instruments related to the rights of indigenous peoples in relation to other entities of the United Nations system at the global, regional and national levels. As highlighted above, the Special Rapporteur fully acknowledges the need for close cooperation and partnership with the Permanent Forum and the expert mechanism, as well as with the United Nations Secretariat, its regional presences and the specialized agencies, with a view to working together in the important task of promoting the implementation of the rights affirmed in the Declaration. The Special Rapporteur is sincerely committed to this task as part of his forthcoming activities and this cooperation guides his engagement with States, indigenous peoples' organizations and other civil society partners.

### 2. Central role of States

52. In the seventh preambular paragraph, the Declaration emphasizes the "urgent need to respect and promote the inherent rights of indigenous peoples". Like any other human rights instrument, the Declaration confers a pivotal role to State actors

[17] For a more detailed discussion of the role of the United Nations in upholding and operationalizing the rights set forth in the United Nations Declaration on the Rights of Indigenous Peoples, see A/HRC/9/9, paras. 60-73.

in the promotion and protection of the rights affirmed therein. The central role of the State is further reinforced by the essentially reparative orientation of the instrument, which requires States to take affirmative measures to attack the systemic problems that indigenous peoples face in the enjoyment of their human rights in ways that are consistent with their specific cultural characteristics and their own expressed wishes.

53. The Declaration requires that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration" (article 38). This general mandate is further elaborated on in other provisions, with specific affirmative measures required from States in connection with almost all the rights affirmed in the Declaration.

54. The kind of State action required to operationalize the rights affirmed in the Declaration thus entails an ambitious programme of legal and policy reform, institutional action and reparations for past wrongs, involving a myriad of State actors within their respective spheres of competence. The former chair of the Working Group on Indigenous Populations, Ms. Erica-Irene Daes, described this process as "belated State-building", a process "through which indigenous peoples are able to join with all the other peoples that make up the State on mutually agreed upon and just terms, after many years of isolation and exclusion".[18] This spirit of cooperation and mutual understanding between States and indigenous peoples is a theme throughout the Declaration, including in the provision that underlines the value of historical and modern treaties or compacts as mechanisms to advance relations of cooperation between indigenous peoples and States (article 37).

55. Together with the call for specific State action, articles 4 and 39 of the Declaration jointly call upon States to provide financial and technical support for the operation of indigenous self-governance institutions, without prejudice to the support provided through international cooperation. The need for such support naturally follows from the effective recognition of indigenous peoples' self-governing or autonomous systems, which necessarily connect to the wider political and institutional structures of the countries in which these peoples live. In addition, this State support helps empower indigenous peoples in their autonomous management and provision of social services, such as in the area of education, which also contributes to the fulfilment of the States' general obligations with regard to the economic, social and cultural rights of citizens.

56. Implementing the Declaration will normally require or may be facilitated by the adoption of new laws or the amendment of existing legislation at the domestic level, as envisaged by article 38 of the Declaration, which calls for appropriate "legislative measures". Also normally required will be new regulatory frameworks, which in most countries are still lacking or are insufficient. It is important to note that the legal and institutional transformations required by the Declaration are usually not sufficiently addressed solely by enacting specific "indigenous laws", as many States have done, but rather will normally also involve the transformation of broader legal structures in key areas. Domestic courts play a key role in operationalizing the rights of indigenous peoples as affirmed in international

[18] Erica-Irene A. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination", 3 *Transn'l L. & Contemp. Probs.* 1, 9 (1993).

standards. Even if not empowered to directly apply the Declaration, domestic courts may and should use the Declaration as an interpretive guide in applying provisions of domestic law.

57. But legal recognition and judicial action are only potential preconditions for operationalizing indigenous peoples' rights under the Declaration, at the local level. The former Special Rapporteur noted that recent processes of constitutional and legal reform in various countries have not necessarily led to actual changes in the daily lives of indigenous peoples and that an "implementation gap" continues to exist between "legislation and the day-to-day reality".[19] Bridging this gap requires the concerted, goal-oriented action of a myriad of governmental actors within the scope of their respective fields of competence and involves a mixture of political will, legal reform, technical capacity and financial commitment.

### 3. Indigenous peoples

58. The objective stated in the eighteenth preambular paragraph of the Declaration of enhancing "harmonious and cooperative relations between the State and indigenous peoples" involves indigenous communities, authorities and organizations as fundamental actors in realizing the rights affirmed in this instrument. The Declaration's affirmation of the right to self-determination and extension of that right into the different spheres of indigenous life requires positive engagement, in a spirit of partnership, by both States and indigenous peoples, without which the Declaration would never be effective.

59. Therefore, wide affirmation of the rights of indigenous peoples in the Declaration does not only create positive obligations for States, but also bestows important responsibilities upon the rights-holders themselves. This interaction between the affirmation of rights and the assumption of responsibilities is particularly crucial in areas in which the Declaration affirms for indigenous peoples a large degree of autonomy in managing their internal and local affairs. Positive action by indigenous peoples' organizations is required, by definition, for the exercise of their rights to maintain and develop institutions and mechanisms of self-governance. The Declaration simultaneously acknowledges the economic implications of indigenous self-government or autonomy, affirming indigenous peoples' rights to State financial and technical assistance and international cooperation in order to exercise their rights and fulfil their responsibilities in this regard (articles 4 and 39).

60. Notably, indigenous peoples are called upon to exercise responsibilities for the preservation, exercise and development of their cultural heritage and expressions.[20] The Declaration further acknowledges indigenous peoples' intergenerational responsibilities, including environmental stewardship, with regard to their traditional lands, territories and resources (articles 25 and 29).

61. The implementation of the Declaration by indigenous peoples may also require them to develop or revise their own institutions, traditions or customs through their own decision-making procedures. The Declaration recalls that the functioning of

[19] E/CN.4/2006/78, para. 5.

[20] Article 12, para. 1 (right to indigenous spiritual and religious traditions); article 13, para. 1 (right to their languages, literature and philosophies); article 31, para. 1 (right to their traditional knowledge and technologies).

indigenous institutions should be "in accordance with international human rights standards" (article 34) and calls for particular attention "to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities", including in the elimination of all forms of discrimination and violence against indigenous children and women (article 22). With an appropriate understanding of these provisions, the Declaration is a powerful tool in the hands of indigenous peoples to mainstream human rights within their respective societies in ways that are respectful to their cultures and values.

### 4. Civil society

62. The kind of systemic changes required to operationalize the Declaration at the local level cannot be ultimately achieved without the involvement of society at large and the engagement of social sectors such as the educational system, the media, the arts, religious groups and the business community. Societal involvement is a prerequisite for eliminating entrenched discrimination and prejudices against indigenous peoples, particularly in the fields of education, culture and information. In this regard, the Declaration mandates that indigenous peoples' "cultures, traditions, histories and aspirations ... shall be appropriately reflected in education and public information" (article 15, para. 1), which is further extended to "privately owned media" (article 16, para. 2). The respect for indigenous peoples' cultural property and traditional knowledge further touches upon the activities of other societal actors, including churches, academic and research institutions, and museums.

63. In view of their impacts on the activities and daily life of indigenous peoples, local and transnational business enterprises also have an important responsibility to respect and promote the rights and principles of the Declaration. This is particularly relevant in relation to the guarantees set forth in article 32 of the Declaration regarding development or resource extraction projects affecting indigenous territories. In this connection, the Permanent Forum has called upon transnational corporations to respect the standards affirmed in the Declaration.[21]

64. In the recent past, a number of local and international non-governmental organizations have played a central role in specifically supporting indigenous peoples' demands and promoting the respect for their rights, for which they should be credited. They should be now seen as key actors in disseminating the content of the Declaration and in facilitating a constructive dialogue among States, indigenous peoples and other relevant stakeholders in order to promote its implementation. Some of these organizations are already engaged in such activities, which should be supported by States and the donor community at large.

## V. Conclusions and recommendations

### A. Cooperation with other mechanisms and bodies

65. **Coordination with the Permanent Forum on Indigenous Peoples and the expert mechanism on the rights of indigenous peoples is an important aspect of the implementation of the mandate of the Special Rapporteur. The respective**

[21] E/2008/43-E/C.19/2008/13, para. 26.

mandates of those three mechanisms, which were created at different times and in response to different moments in the international movement to protect the rights of indigenous peoples, are complementary but also overlapping in certain ways. Ongoing efforts at coordination among the three mechanisms should be strengthened and consolidated into a permanent feature of their work, both jointly and separately.

66. Likewise, the Special Rapporteur welcomes opportunities for his cooperation with agencies and programmes throughout the United Nations system, as well as with regional and specialized institutions. This cooperation should continue in order to promote awareness of indigenous issues and programmatic action that is conducive to mainstreaming those issues and to effectively implementing standards of indigenous rights as affirmed in relevant international instruments.

## B. Areas of work

67. The Special Rapporteur's work pursuant to his mandate falls within four interrelated and mutually reinforcing areas: promoting good practices; thematic studies; country reports; and cases of alleged human rights violations, with the latter category being the one that has required the greatest amount of attention on an ongoing basis. The Special Rapporteur is grateful for the cooperation received from several States, indigenous peoples and others in all aspects of his work. He urges States that have not responded to his communications of alleged human rights violations to do so, and urges States which have not responded to requests for country visits to respond positively.

## C. Operationalization of the rights set out in the United Nations Declaration

68. The United Nations Declaration on the Rights of Indigenous Peoples represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. The product of a protracted drafting process involving the demands voiced by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No. 169 and other relevant instruments and processes.

69. Accordingly, the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.

70. For the Declaration to be fully operative, States must pursue a range of affirmative, special measures that engage the various institutions of law-making and public administration. This involves a complex process of legal and institutional reform, judicial action, specific policies and special reparations procedures. It is a process that requires the full political engagement and financial commitment of States, and which is not free from obstacles and difficulties of all sorts.

71. Governments play a key role in ensuring that different actors involved are aware of the Declaration and sufficiently understand its provisions. Accordingly, the Special Rapporteur encourages and supports the efforts of States to raise awareness and provide technical training to Government officials, members of legislative bodies and of national human rights institutions, judicial authorities and all other relevant actors, including civil society and indigenous peoples themselves, and reiterates his commitment to offer assistance in this regard, where necessary.

72. In carrying out his work, the Special Rapporteur has emphasized that the positive or special measures required to operationalize the Declaration need to reach the existing local institutional arrangements and policy frameworks, which in some cases may have to be reformed to accommodate the particular needs of indigenous peoples, as underlined in the Declaration. This is particularly important in areas, emphasized in the Declaration, in which the realization of indigenous peoples' rights is inextricably connected to general State policies, such as in the areas of natural resources, education, culture and health, and in State development strategies and plans.

73. The United Nations system and special agencies, funds and programmes, including human rights mechanisms with indigenous-specific mandates (such as the Permanent Forum, the expert mechanism and the Special Rapporteur), play a central role in promoting the implementation of the Declaration at the local level. The principles and rights affirmed in the Declaration constitute or add to the normative frameworks for the activities of United Nations human rights institutions as they relate to indigenous peoples, including with regard to development cooperation targeted for the benefit of indigenous peoples and other activities that may in some way affect indigenous interests.

74. In exercising their rights and responsibilities under the Declaration, indigenous peoples themselves can be guided by the normative tenets of the Declaration, acting as promoters of the rights upheld therein in a spirit of cooperation. The Special Rapporteur underscores that positive action by indigenous peoples themselves is by definition required for the exercise of their rights to maintain and develop institutions and mechanisms of self-governance. Pursuant to his mandate, the Special Rapporteur has emphasized the development of a regular, cooperative dialogue with indigenous peoples in carrying out his work.

75. In a related manner, non-governmental actors have a role in the promotion of and respect for the Declaration. As it does for State and international agencies, the Declaration not only provides civil society organizations with a set of clear programmatic priorities in their activities affecting indigenous peoples, but also with a set of guidelines that should regulate the design and implementation of these activities. The Special

**Rapporteur encourages the mainstreaming of the rights of indigenous peoples into the activities of civil society partners engaged in the social sectors, including but not limited to the educational system, the media, the arts, religious groups and the business community.**